

ESTTA Tracking number: **ESTTA491357**

Filing date: **08/28/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Cytosport, Inc.
Granted to Date of previous extension	08/29/2012
Address	4795 Industrial Way Benicia, CA 94510 UNITED STATES
Correspondence information	Jed H. Hansen THORPE NORTH & WESTERN, LLP 8180 South 700 East Suite 350 Sandy, UT 84070 UNITED STATES hansen@tnw.com, kelley.warner@tnw.com, docket@tnw.com,

### Applicant Information

Application No	85538901	Publication date	05/01/2012
Opposition Filing Date	08/28/2012	Opposition Period Ends	08/29/2012
Applicant	Ori Hofmekler 6117 Corbin Avenue Tarzana, CA 91356 UNITED STATES		

### Goods/Services Affected by Opposition

Class 029. All goods and services in the class are opposed, namely: milk-based protein energy drinks
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### Grounds for Opposition


Priority and likelihood of confusion	Trademark Act section 2(d)
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### Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2973352	Application Date	05/27/2003
Registration Date	07/19/2005	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK		
Design Mark			
Description of Mark	NONE		

Goods/Services	Class 005. First use: First Use: 2001/10/01 First Use In Commerce: 2001/10/01 Meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and pre-mixed nutritionally fortified beverages Class 029. First use: First Use: 2001/10/01 First Use In Commerce: 2001/10/01 Protein based, nutrient-dense snack bars
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U.S. Registration No.	3132139	Application Date	02/24/2005
Registration Date	08/22/2006	Foreign Priority Date	NONE
Word Mark	MIGHTY MILK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2004/12/00 First Use In Commerce: 2005/07/00 DIETARY AND NUTRITIONAL SUPPLEMENTS		

U.S. Registration No.	3886569	Application Date	02/09/2007
Registration Date	12/07/2010	Foreign Priority Date	NONE
Word Mark	MIGHTY MILK BAR		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2010/10/14 First Use In Commerce: 2010/10/14 Dietary and nutritional supplement Class 029. First use: First Use: 2010/10/14 First Use In Commerce: 2010/10/14 Fortified food, namely, protein based, nutrient-dense snack bars		

U.S. Registration No.	3333886	Application Date	02/09/2007
Registration Date	11/13/2007	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK LIGHT		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2007/01/00 First Use In Commerce: 2007/01/00 Dietary and nutritional supplements		

U.S. Registration No.	3971667	Application Date	06/05/2005
Registration Date	05/31/2011	Foreign Priority Date	NONE
Word Mark	MONSTER MILK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2008/07/00 First Use In Commerce: 2008/07/00 Dietary and nutritional supplements, excluding ready to drink beverages		

U.S. Registration No.	3311489	Application Date	02/09/2007
Registration Date	10/16/2007	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK N' OATS		

Design Mark	<b>MUSCLE MILK N' OATS</b>
Description of Mark	NONE
Goods/Services	Class 005. First use: First Use: 2006/01/00 First Use In Commerce: 2006/01/00 Dietary and nutritional supplement Class 030. First use: First Use: 2006/01/00 First Use In Commerce: 2006/01/00 Fortified food, namely, protein based, nutrient-dense oatmeal

U.S. Registration No.	2714802	Application Date	01/13/1999
Registration Date	05/13/2003	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1998/06/01 First Use In Commerce: 1998/06/01 Powdered nutritional supplement containing milk derived ingredients for adding to food or drink		

U.S. Registration No.	2809666	Application Date	05/22/2000
Registration Date	02/03/2004	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK		
Design Mark	<b>MUSCLE MILK</b>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1999/10/08 First Use In Commerce: 1999/10/08 nutritional supplements		

U.S. Registration No.	3815321	Application Date	02/20/2009
Registration Date	07/06/2010	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK REFUEL		

Design Mark	<b>MUSCLE MILK REFUEL</b>
Description of Mark	NONE
Goods/Services	Class 032. First use: First Use: 2009/06/29 First Use In Commerce: 2009/06/29 Protein enhanced energy drink

U.S. Registration No.	4006712	Application Date	08/19/2009
Registration Date	08/02/2011	Foreign Priority Date	NONE
Word Mark	POWER MILK		
Design Mark	<b>POWER MILK</b>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2010/02/11 First Use In Commerce: 2010/02/11 Dietary and Nutritional supplement		

U.S. Application No.	77750913	Application Date	06/03/2009
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK PROH2O		

Design Mark	<b>MUSCLE MILK PROH2O</b>
Description of Mark	NONE
Goods/Services	Class 005. First use: Nutritionally enhanced water; Protein enhanced water

U.S. Registration No.	3788434	Application Date	03/05/2009
Registration Date	05/11/2010	Foreign Priority Date	NONE
Word Mark	SMART MILK		
Design Mark	<b>SMART MILK</b>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2009/10/21 First Use In Commerce: 2009/10/21 powdered nutritional supplement for use as milk replacement		

U.S. Application No.	77960386	Application Date	03/16/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK FIT SHAKE		

Design Mark	<b>MUSCLE MILK FIT SHAKE</b>
Description of Mark	NONE
Goods/Services	Class 005. First use: Dietary and nutritional supplements; Meal replacement drinks; Dietary and nutritional supplement drinks; Protein drinks; and Pre-mixed nutritionally fortified beverages

U.S. Application No.	85094686	Application Date	07/28/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	<b>MUSCLE MILK ACTIVE</b>		
Design Mark	<b>MUSCLE MILK ACTIVE</b>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: nutritional supplements; dietary supplements; meal replacement drinks: nutritionally fortified beverages; nutritionally fortified snack bars; nutritionally fortified meal replacement bars; meal replacement and dietary supplemental drink mixes; all of the foregoing containing milk derived ingredients		

U.S. Application No.	85219931	Application Date	01/18/2011
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	<b>MUSCLE MILK PROTEIN</b>		

Design Mark	<b>MUSCLE MILK PROTEIN</b>
Description of Mark	NONE
Goods/Services	Class 005. First use: Protein fortified nutritional supplements containing milk derived ingredients; Protein fortified dietary supplements containing milk derived ingredients; Protein fortified meal replacement drinks containing milk derived ingredients; Protein fortified and nutritionally fortified beverages containing milk derived ingredients; protein fortified and nutritionally fortified snack bars containing milk derived ingredients; protein fortified and nutritionally fortified meal replacement bars containing milk derived ingredients; protein fortified meal replacement and dietary supplement drink mixes containing milk derived ingredients

U.S. Application No.	85144460	Application Date	10/04/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	CYTOSPORT MONSTER MILK		
Design Mark	<b>CYTOSPORT MONSTER MILK</b>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: Ready to drink protein drinks containing milk derived ingredients for use as dietary and nutritional supplements, excluding energy drinks		

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## Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Jed H. Hansen/
Name	Jed H. Hansen
Date	08/28/2012

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Jed H. Hansen  
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Attorneys for CytoSport, Inc.  
Opposed Mark: MILK BOMB  
U.S. Trademark Application Serial Number 85/538,901

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

CytoSport, Inc.  Opposer,  v.  Ori Hofmekler  Applicant.	Opposition No. _____
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**NOTICE OF OPPOSITION**

CytoSport, Inc. (hereinafter referred to as “Opposer”), a corporation existing under the laws of the State of California, having a principal place of business at 4795 Industrial Way, Benicia, California 94510, believes it will be damaged by the registration of the mark MILK BOMB in Application Serial No. 85/538,901, and opposes and alleges the following:

1. Mr. Ori Hofmekler (hereinafter referred to as “Applicant”), upon information and belief is an individual residing in the State of California, having a principal place of business or

residence at 6117 Corbin Ave., Tarzana, CA 91356, seeks to register the mark MILK BOMB as a trademark for “milk-based protein energy drinks” in International Class 029.

3. CytoSport’s powdered and ready-to-drink nutritional supplement products are sold under a variety of trademarks, including, Muscle Milk®, Muscle Milk Light®, Diet Muscle Milk™, Muscle Milk Natural™, Mighty Milk®, and Monster Milk®.

4. CytoSport also sells other nutritional supplement products using similar trademarks including, Muscle Milk® and Muscle Milk Light® in connection with snack bars, Mighty Milk Bar® in connection with snack bars, and Muscle Milk N’ Oats® in connection with nutrient dense oatmeal. As such CytoSport has built a family of brands and trademarks having the common term “milk” which is and has become a very distinctive and recognizable component to CytoSport’s family of marks.

5. CytoSport has been using numerous of the above-referenced marks in commerce for many years. For example, CytoSport’s Muscle Milk® mark has been used in commerce since at least as early as June of 1998. The above-referenced marks are collectively referred to herein as CytoSport’s Milk Family of Trademarks. Products associated with that family of trademarks are collectively referred to herein as CytoSport’s Milk Family of Products.

6. CytoSport is the owner of several United States federal trademark registrations associated with its Milk Family of Trademarks including the following: U.S. Trademark Reg. Nos. 2,714,802 for the mark Muscle Milk® for use in connection with “powdered nutritional supplement containing milk derived ingredients for adding to food and drink,” 2,973,352 for the mark Muscle Milk® for use in connection with “meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and premixed nutritionally fortified beverages” 2,809,666 for the mark Muscle Milk® for use in

connection with “nutritional supplements,” 3,333,886 for the mark Muscle Milk Light® for use in connection with “dietary and nutritional supplements,” 3,311,489 for the mark Muscle Milk N’ Oats® for use in connection with “dietary and nutritional supplements” and “fortified foods, namely protein based, nutrient-dense oatmeal,” 3,132,139 for the mark Mighty Milk® for use in connection “dietary and nutritional supplements,” 3,886,569 for the mark Mighty Milk Bar® for use in connection with “dietary and nutritional supplements,” and “fortified foods, namely protein based, nutrient-dense snack bars,” 3,815,321 for the mark Muscle Milk Refuel® for use in connection with “protein enhanced energy drinks,” 3,971,667 for the mark Monster Milk® for use in connection with “dietary and nutritional supplements, excluding ready to drink beverages,” and 4,006,712 for the mark Power Milk® for use in connection with “dietary and nutritional supplements.”

7. CytoSport is also the owner of numerous pending applications for federal trademark registration, many of which have been allowed and have been used in commerce for numerous years. Those pending applications include applications for the marks, Mighty Milk N’ Oat<sup>TM</sup>, Sport Milk<sup>TM</sup>, Muscle Milk ProH<sub>2</sub>O<sup>TM</sup>, Smart Milk<sup>TM</sup>, Muscle Milk Fit Shake<sup>TM</sup>, Muscle Milk Active<sup>TM</sup>, Muscle Milk Protein<sup>TM</sup>, and CytoSport Monster Milk<sup>TM</sup>.

8. CytoSport’s Milk Family of Products have been very successful products with sales growing significantly since introduction.

9. CytoSport has sold hundreds of millions of dollars of its Milk Family of Products across the United States and invested tens of millions of dollars in the promotion and advertisement of those products. CytoSport’s promotion efforts include, for example, its internet website, point of sale materials, sponsorship of live events, contests, and attendance at tradeshow.

10. As part of its promotional activities, CytoSport utilizes numerous athletes to endorse members of its Milk Family of Products. Through its Muscle Milk® Collegiate program, CytoSport endorses members of its Milk Family of Products at over 30 colleges and universities across the country.

11. As a result of the quality of CytoSport's Milk Family of Products and the immense investment in marketing and promotion of those products, CytoSport's Milk Family of Products have garnered nationwide attention and received numerous awards from third parties, including Beverage of the Year in 2008 by BEVnet a leading beverage industry publication.

12. Due to its large distribution and customer awareness of its Milk Family of Products, CytoSport has significant common law rights associated with its Milk Family of Trademarks throughout the United States. CytoSport's Milk Family of Trademarks have acquired great value as identifiers of CytoSport's products and serve to distinguish CytoSport's Milk Family of Products from those of others in the marketplace. Customers in this judicial district and elsewhere readily recognize members of CytoSport's Milk Family of Trademarks and the associated trade dress as distinctive designations of the origin of CytoSport's Milk Family of Products. CytoSport's Milk Family of Trademarks are assets of enormous value as symbols of CytoSport and its quality products and goodwill.

13. Registration of Applicant's mark MILK BOMB is likely to damage Opposer because when Applicant's mark is used in connection with the identified goods, it so resembles CytoSport's Milk Family of Trademarks as to be likely to cause confusions, to cause mistake, or to deceive. Such confusion is likely to falsely suggest a connection between Applicant and Opposer.

14. Opposer also alleges that its MUSCLE MILK trademark is famous and will be diluted by Applicant's mark.

15. Upon information and belief, Applicant selected its mark with full knowledge of Opposer's marks.

WHEREFORE, Opposer requests that Application Serial No. 85/538,901 be refused registration, that no registration be issued to Applicant for the mark MILK BOMB and that this Opposition be sustained in favor of Opposer.

That statutory Opposition Filing Fee of \$300.00 per class opposed is included herewith. Please charge any additional fees and credit any overpayment to Deposit Account No. 20-0100.

DATED this 28<sup>th</sup> of August, 2012.

Respectfully submitted,

/Jed H. Hansen/

Peter M. de Jonge  
Jed H. Hansen  
Eric E. Westerberg  
Attorneys for Opposer

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **Notice of Opposition** was served upon the Defendant at the following by the methods indicated below:

Colin J. Gibson  
1353 Elysian Park Drive  
Los Angeles, California 90026-3407

- ☐ Electronic Mail
- ☒ United States Mail  
First Class, Postage Pre-Paid
- ☐ Overnight Delivery
- ☐ Fax Transmission

DATED this 28<sup>th</sup> day of August, 2012.

*/Kelley Warner/*  
Kelley Warner